

LAW OFFICES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
(206) 623-1700

ARTHUR W. HARRIGAN, JR.

E-MAIL: ARTHURH@CALFOHARRIGAN.COM
FACSIMILE: (206) 623-8717

August 23, 2013

VIA ECF

The Honorable James L. Robart
United States District Court
Western District of Washington
700 Stewart Street, Suite 14128
Seattle, WA 98101-9906

Re: Microsoft Corp. v. Motorola, Inc., et al., No. 10-cv-1823-JLR

Dear Judge Robart:

We write in response to Motorola's August 22, 2013 letter regarding the Court's Preliminary Instruction No. 2 (Dkt. No. 864). Motorola requests that the Court modify Preliminary Instruction No. 2 by adding, at page 11, line 8, the sentence: "Under Motorola's contracts with the IEEE and ITU, Motorola did not need to make an initial offer on RAND terms."

Microsoft would consent to the addition, so long as the added sentence also includes the following clause, indicated by underlining:

Under Motorola's contracts with the IEEE and ITU, Motorola did not need to make an initial offer on RAND terms, but a blatantly unreasonable offer is a breach of the duty of good faith and fair dealing and so a breach of the RAND contract.

That language was proposed in Microsoft's Revised Proposed Preliminary Instruction No. 2 (Dkt. No. 856 at 11:1-3), and gives the full context of the Court's ruling on this issue:

Accordingly, the court concludes that under Motorola's agreements with the IEEE and the ITU, Motorola need not make initial offers on RAND terms.

This conclusion, however, does not mean that Motorola, as the owner of standard essential patents subject to RAND licensing agreements with the IEEE and ITU, may make blatantly unreasonable offers to implementers.

(Dkt. No. 335 at 24:21-25:5.) The Court continued, "Thus, although the language of Motorola's agreements do not require it to make offers on RAND terms, any offer by Motorola (be it an

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initial offer or an offer during a back-and-forth negotiation) must comport with the implied duty of good faith and fair dealing inherent in every contract,” and held that the fact finder would need to compare Motorola’s offer against a RAND royalty in order “to determine whether Motorola’s offers were so blatantly unreasonable as to breach its duty of good faith.” (*Id.* at 25:9–12, 25:18–20.)

Microsoft has no objection to the jury receiving a preliminary instruction on the Court’s rulings on initial offers, so long as the jury hears the complete ruling the Court has made.

Very truly yours,

CALFO HARRIGAN LEYH EAKES LLP

s/ Arthur W. Harrigan, Jr.

Arthur W. Harrigan, Jr.

cc: All Counsel (via ECF)

CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 23rd day of August, 2013, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751	_____ Messenger
Philip S. McCune, WSBA #21081	_____ US Mail
Summit Law Group	_____ Facsimile
315 Fifth Ave. South, Suite 1000	<u> X </u> ECF
Seattle, WA 98104-2682	
Telephone: 206-676-7000	
Email: Summit1823@summitlaw.com	

Steven Pepe (<i>pro hac vice</i>)	_____ Messenger
Jesse J. Jenner (<i>pro hac vice</i>)	_____ US Mail
Ropes & Gray LLP	_____ Facsimile
1211 Avenue of the Americas	<u> X </u> ECF
New York, NY 10036-8704	
Telephone: (212) 596-9046	
Email: steven.pepe@ropesgray.com	
Email: jesse.jenner@ropesgray.com	

Norman H. Beamer (<i>pro hac vice</i>)	_____ Messenger
Ropes & Gray LLP	_____ US Mail
1900 University Avenue, 6 th Floor	_____ Facsimile
East Palo Alto, CA 94303-2284	<u> X </u> ECF
Telephone: (650) 617-4030	
Email: norman.beamer@ropesgray.com	

Paul M. Schoenhard (<i>pro hac vice</i>)	_____ Messenger
Ropes & Gray LLP	_____ US Mail
One Metro Center	_____ Facsimile
700 12 th Street NW, Suite 900	<u> X </u> ECF
Washington, DC 20005-3948	
Telephone: (202) 508-4693	
Email: Paul.schoenhard@ropesgray.com	

Andrea Pallios Roberts (*pro hac vice*)
Brian C. Cannon (*pro hac vice*)
Quinn Emanuel Urquhart & Sullivan, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
Telephone: (650) 801-5000
Email: andreaproberts@quinnemanuel.com
Email: briancannon@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

Kathleen M. Sullivan (*pro hac vice*)
David Elihu (*pro hac vice*)
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Email: kathleensullivan@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

William Price (*pro hac vice*)
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figuera St., 10th Floor
Los Angeles, CA 90017
Telephone: (212) 443-3000
Email: williamprice@quinnemanuel.com
MicrosoftvMotoBreachofRANDCase@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

DATED this 23rd day of August, 2013.

s/ Florine Fujita _____
FLORINE FUJITA